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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

UITERWYK CORPORATION,
Petitioner

versus

CTI-CONTAINER LEASING CORPORATION,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals acted beyond the scope of its appellate jurisdiction over final orders under 28 U.S.C. §1291 by reviewing a district court order staying an admiralty proceeding pending a determination by the Iran-United States Claims Tribunal of its jurisdiction over the claim.

2. Whether the Circuit Court order vacating the stay of the claim of CTI-Container Leasing Corporation against Petitioner Uiterwyk Corporation, while severing and staying Petitioner's claim on the same transaction against its principal, Iran Express Lines, results in an unconstitutional taking of Petitioner's contract right to be indemnified, held harmless and defended in this action by its principal.

3. Whether under the Hostage Accords, the Iran-United States Claims Tribunal must be allowed to determine its own jurisdiction over claims which are concurrently pending before United States federal district courts and the Claims Tribunal before the claims can be adjudicated in United States Courts.

4. Whether the Court of Appeals erred as a matter of law by deciding that a district court stay order pending a determination by the Iran-United States Claims Tribunal of its jurisdiction is an abuse of discretion by the District Court because the length of the stay at the time it was entered was not subject to termination on a definite date.

5. Whether Iran Express Lines and the Islamic Republic of Iran are indispensible parties pursuant to Rule 19(b) of the Federal Rules of Civil Procedure having been tendered directly to Respondent-Plaintiff CTI-Container Leasing Corporation pursuant to Rule 14(c) of the Federal Rules of Civil Procedure.

6. Whether Respondent's claim is for judicial relief in connection with claims presented to the Iran-United

States Claims Tribunal, mandating a stay of such proceedings under the express terms of Executive Order 12,294. (Feb. 24, 1981).)

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The Petitioner, Uiterwyk Corporation, prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit filed on September 13, 1982.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated September 13, 1982, reported at 685 F.2d 1284 (11th Cir. 1982) (A-1) reversed the Order of the United States District Court for the Middle District of Florida dated June 19, 1981 (A-16). This action, based upon claims arising under leases for ocean cargo containers for an Iranian shipping company, had been stayed by the District Court pending the determination of the Iran - United States Claims Tribunal of its jurisdiction to hear these claims.[2]

The United States Court of Appeals for the Eleventh Circuit held that it had jurisdiction to review the stay ordered by the District Court as a final order under 28 U.S.C. §1291. The Appeals Court held that it was an abuse of discretion for the District Court to stay this action pending a determination by the Tribunal of its jurisdiction over these claims. The Appeals Court found it could join the Iranian parties to this litigation, then sever and stay the action against them without considering the prejudicial effect on the remaining parties pursuant to Rule 19(b) of the Federal Rules of Civil Procedure.

Uiterwyk Corporation ("Uiterwyk") submitted a Petition for Rehearing with a Suggestion for Rehearing En Banc to the Court of Appeals, which was denied without opinion on October 18, 1982. (A-19).

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1. Parties to this proceeding below included Uiterwyk Corporation and CTI-Container Leasing Corporation. Uiterwyk Corporation has no parent companies nor does it own any stock or other equity interest in any other corporation.

2. The District Court order was entered in four cases, including this action. (A-16). In each action the United States had filed a Statement of Interest which set forth the obligations of the United States under the Iranian Hostage Accords.

JURISDICTION

The Judgment (A-18) and Opinion of the Court of Appeals for the Eleventh Circuit was filed on September 13, 1982. Uiterwyk Corporation filed a Petition for Rehearing with a Suggestion for Rehearing En Banc on October 1, 1982 which was denied by an Order of the Court of Appeals on October 18, 1982 (A-19). This Petition for a Writ of Certiorari has been filed within the time limits prescribed by law. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

TREATIES AND EXECUTIVE ORDERS INVOLVED

The construction and proper application of Executive Order 12,294, 46 Fed.Reg. 14,111, February 24, 1981, (A-21), the Declaration of the Government of the Democratic and Popular Republic of Algeria (A-24), and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, January 19, 1981, 46 Fed. Reg. 7913-32 (Jan. 23, 1981) (A-32) are directly involved in this Petition and are set out verbatim in the Appendix to this Petition.

STATEMENT OF THE CASE

This case resulted from the disruption of normal business relationships caused by the revolution in Iran. The total breakdown of commercial contact between U.S. entities and Iran occurred on November 4, 1979, when approximately 400 Iranians seized the American Embassy in Tehran, Iran taking Embassy personnel as hostages. Uiterwyk had been acting in the United States as general agent for an Iranian shipping company, Iran Express Lines ("IEL"), which operated vessels carrying containerized cargo from the East Coast of the United

States and the Far East to Iran. At the time of the revolution hundreds of containers leased for IEL were in Iran, where they remain.

After intensive negotiations the United States effected the release of the hostages in Iran. The "bargaining chip" used by the United States to resolve this crisis were the assets of the Iranian Government and nationalized companies, attached by private parties in the courts of the United States.[3]

The United States committed itself, as part of the Hostage Accords, to terminate all legal proceedings in the United States involving claims of United States persons and institutions against Iran and Iranian state enterprises. The United States further agreed to nullify all attachments and judgments obtained against Iranian property, to prohibit further litigation based on claims against Iran and its State enterprises and to bring about the termination of these claims through binding arbitration. On February 24, 1981 all domestic litigation against Iran was suspended by Executive Order No. 12,294 (46 Fed. Reg. 14,111) (A-21). It is the construction of Executive Order 12,294 as applied to the claims of the parties to this litigation that requires the attention of this Court.

Petitioner, Uiterwyk, is a United States corporation, with its principal place of business in Florida. Uiterwyk acts as an agent for entities whose business includes the carriage of cargo in the international maritime trade.

Uiterwyk was appointed general agent in the United States by IEL, an Iranian limited joint stock shipping company. Uiterwyk and IEL entered into a general agency agreement (A-38) which required Uiterwyk, *inter alia*, to act on behalf of IEL to obtain the containers necessary for the carriage of ocean cargo.

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3. On April 20, 1980 Uiterwyk Corporation had attached Iranian assets in the amount of $15,764,207.00 in the Chase Manhattan Bank, pursuant to Civil Action 80 Civ. 1520 (CES) S.D.N.Y.

Uiterwyk owned no vessels, and carried no cargo for its own account.

Uiterwyk entered into leases on behalf of IEL with numerous container lessors, including CTI-Container Leasing Corporation ("CTI").[4] The containers were used by IEL for the ocean shipment of cargoes to Iran. IEL was obligated to bear all expenses incurred in obtaining and using these containers. Certain containers remain in the custody and control of the Government of Iran and IEL. Subsequent to the revolution, IEL became an agency or instrumentality of the Government of Iran within the meaning of the Foreign Sovereign Immunities Act.

On October 6, 1980 CTI filed suit against Uiterwyk in the United States District Court for the Middle District of Florida in Tampa alleging the breach of six leases for ocean-going containers and related equipment.[5] In its Complaint CTI alleged both diversity and admiralty jurisdiction but specifically elected to proceed in the admiralty jurisdiction of the Court, and designated the claim as an Admiralty and Maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure (FRCP). On January 20, 1981 Uiterwyk filed its

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4. Each lessor drafted its own unique lease. CTI was and is the largest lessor of ocean containers in the world.

5. In addition to the Civil Action brought by CTI against Uiterwyk in the Middle District of Florida in Tampa, CTI brought the same action against Uiterwyk in the United States District Court for the District of Maryland, No. JH-80-313 (D.Md. filed February 8, 1980) and a similar action in the United States District Court for Savannah, Civil Action No. 480-282 (D.Ga. September 19, 1980). The action in Savannah was dismissed by that Court by Order of July 20, 1981. On January 21, 1982 the District Court in Maryland severed and stayed the Third-Party claims of Uiterwyk against Iran and IEL. The remainder of that action was referred to a Magistrate, who, on May 17, 1982 stayed the action of CTI against Uiterwyk pending review by the Eleventh Circuit Court of Appeals of the Stay Order issued in the Middle District of Florida. Subsequent to the Eleventh Circuit opinion Uiterwyk filed a Motion to transfer the Maryland action to the Tampa District Court.

Answer and defenses and, 15 days after filing its Answer, moved under FRCP Rule 14(c) for permission to join the Government of Iran and IEL, an agency or instrumentality of the Islamic Republic of Iran within the meaning of the Foreign Sovereign Immunities Act, ("FSIA") 28 U.S.C. §§1330, 1602-1611.

Based upon the allegations of CTI in its Complaint, Uiterwyk filed its Third-Party Complaint against IEL and Iran in which it alleged that Iran and IEL: (1) wrongfully converted or expropriated the containers which were the property of CTI; (2) were responsible for any unpaid rent due to CTI; (3) were solely and directly liable to CTI; and (4) were liable to Uiterywk by way of indemnity or contribution for any sums which Uiterwyk might be held liable to pay CTI.

Since the third-party impleader motion had not yet been granted on February 15, 1981 Uiterwyk filed separate actions against IEL and the Government of Iran based on the same claims and allegations of CTI raised in the Complaint of CTI and in the Third-Party Complaint.[6]

On March 10, 1981 the United States Department of Justice filed a Statement of Interest with the Clerk for the Middle District of Florida, which took the position that actions which were "arguably within" the jurisdiction of the Iran-United States Claims Tribunal ("Tribunal") were to be stayed pursuant to Executive Order 12,294. (Statement of Interest p. 1: "The United States accordingly requests that this Court (1) stay litigation of those claims against Iran *arguably* within the Tribunal's jurisdiction . . ." (emphasis added)) .

Uiterwyk filed a response to the Statement of Interest in which it stated that the litigation before the District Court should be stayed at least until the jurisdiction

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6. These protective actions were stayed by the District Court in Tampa by the same order that stayed the within matter. (M.D. Fla. Civil Action 81-107).

of the Tribunal was determined as to these claims.[7] On June 19, 1981 the District Court entered an Order in this action and in the separate actions filed by Uiterwyk against IEL and Iran, staying the actions ". . . pending determination by the Iran-United States Claims Tribunal of its jurisdiction to hear these claims." (A-18).

The Order of the District Court recognized the unique circumstances which arose in this matter from the suspension of litigation against Iran and its agencies or instrumentalities for foreign policy reasons. This extraordinary governmental action, approved by this Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), effectively removed IEL from this litigation. IEL was the principal on the alleged contracts, and as such had committed to hold harmless, indemnify and *defend* petitioner in all actions arising out of the agency relationship (Agency Agreement A-40). The District Court necessarily balanced the equities and realized that irreparable harm and prejudice to Uiterwyk would result from being forced to proceed in litigation in the United States absent IEL.

CTI appealed the Stay Order of the District Court to the United States Court of Appeals for the Eleventh Circuit. On September 13, 1982 the Court of Appeals held that it had jurisdiction over the appeal of the stay order as a final order under 28 U.S.C. §1291, and then held that the District Court had abused its discretion when it ordered a stay of the action. The Court of Appeals concluded that Iran and IEL were parties to be joined if feasible in this action under FRCP Rule 19(a), and that joining these parties would not divest the Federal Court of jurisdiction under Executive Order 12,294. The Court of Appeals, after joining Iran and IEL, severed and stayed these claims pursuant to the Executive Order, but allowed the remainder of the action to go forward.

7. Uiterwyk filed a claim before the Tribunal before the deadline of January 19, 1982. This claim includes the matters raised in this action.

Iran and IEL have taken contradictory positions in the United States and at the Tribunal. In other litigation in the United States, attorneys for Iran appeared on behalf of IEL, claimed sovereign status and the protection available under the FSIA, and requested that the actions against IEL be stayed pending adjudication at the Tribunal. (*IEL Answer: Backer Navid v. Cunliffe-Fraser, IEL, et al.*, Civil Action 81-136 (M.D. Fla. Tampa) (A-43, 45-48)). At the Tribunal, to attempt to avoid the jurisdiction of that panel, IEL claims to be a private corporation (Statement of Defense, IEL, filed November 15, 1982). IEL is presently available only before the Tribunal, which must resolve the issue of the status of IEL as a state or private entity in order to determine its own jurisdiction. When the jurisdictional issue is determined these claims will either go forward at the Tribunal or, if there is no jurisdiction found by the Tribunal, be revived in the District Court.

Executive Order 12,294 makes no explicit reference to the severance of claims. However, the Executive Order provided for a stay of all claims which "*may*" be in the jurisdiction of the Tribunal, *and* suspended ". . . all claims for equitable or other judicial relief in connection with claims presented to the Tribunal." (A-21). The plain language of Executive Order 12,294 suggests that the District Court properly interpreted that Order in staying this action.

JURISDICTIONAL STATEMENTS

This civil action was brought in the Middle District of Florida in Admiralty pursuant to 28 U.S.C. §1333.

The Court of Appeals for the Eleventh Circuit found that it had jurisdiction over this appeal as a final order pursuant to 28 U.S.C. §1291.

SUMMARY OF THE ARGUMENT IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

The District Court in Tampa acted properly, within the limits of its sound discretion and in compliance with Executive Order 12,294, in staying this matter pending a determination by the Iran-United States Claims Tribunal of its own jurisdiction to hear these claims involving containers leased for an Iranian shipping company. It would not be possible for the District Court to determine the relationships critical to the transactions in question absent Petitioner's principal, IEL.

The Tribunal must determine the status of IEL as a state or private entity in determining its jurisdiction. If it is determined that IEL is a government entity, the claim must be pursued against IEL at the Tribunal. If the Tribunal determines that IEL is not a government entity, the action in the District Court will revive. If the Tribunal determines that IEL is a private entity the Eleventh Circuit is in error in holding that IEL should be joined, and the action against IEL then "severed and stayed" pursuant to Executive Order 12,294 (Opinion A-15).

The Eleventh Circuit Court of Appeals acted beyond the boundaries of its limited appellate jurisdiction in reviewing this stay. The stay is a nonappealable interlocutory docket order in an admiralty case and is not a final order under 28 U.S.C. §1291. This Court has previously held that the stay of an admiralty matter on the District Court's own docket is not appealable. The decision of the Eleventh Circuit concerning the appealability of a stay order is in conflict with the First, Fifth and Seventh Circuits, and is contrary to the prior judgments of this Court.

After erroneously assuming jurisdiction, the Circuit Court misapprehended the underlying action and erred in its application of the guidelines concerning stays set down by this Court. The Circuit Court held, in essence,

that an "indefinite" stay (in the sense the stay abides the jurisdictional determination of the Tribunal) is *per se* immoderate and, therefore, objectionable. (Opinion A-10).

The Circuit Court, on a sparse record and without the trial court's knowledge of the proceedings, substituted its own balancing of equities between the parties for that of the trial court. The Circuit Court discounted the irreparable harm to petitioner as agent in being forced to defend this action without its principal, while simultaneously proceeding against the principal at the Tribunal.[8]

CTI can only allege it might be damaged by a possible delay if it should be required to await the jurisdictional determination of the Tribunal. This delay could be compensated by money damages if actually incurred, and cannot be considered irreparable harm. However, the Circuit Court mistakenly elevated this possibility of delay to a denial of justice. (Opinion A-8).

Executive Order 12,294 suspending litigation in the United States against Iran may work as an unconstitutional taking if the Tribunal fails to afford adequate relief. In *Dames & Moore v. Regan, supra,* at 688, this court determined that the taking issue was not yet ripe. However, Uiterwyk now has experienced an actual taking of its contractual rights if the Eleventh Circuit Order vacating the stay in Tampa is upheld since Uiterwyk was entitled by its agency contract to be defended by IEL in this litigation arising out of Uiterwyk's activities as general agent for IEL. (A-40). Under that contract Uiterwyk would have tendered to IEL its entire defense of the claims of CTI and would have incurred no attorneys' fees or expenses, and would have been insulated from risk. Executive Order 12,294 prevented the real

8. The Circuit Court chose to ignore the pleadings and, without any fact record whatsoever, found that the agency agreement upon which these containers were obtained and are now in Iran was not at issue. (A-12).

joinder of IEL in this litigation, and Uiterwyk cannot effectively tender its defense to IEL despite having properly asserted its claim under FRCP Rule 14(c) on the basis that IEL is wholly liable to CTI.

The stay order entered by the District Court temporarily relieved the prejudice to Uiterwyk from the loss of the right to be defended by IEL by postponing the litigation in Tampa until the Tribunal determined its jurisdiction over this claim. At that time, the Tribunal could protect Uiterwyk's interest in its contract or, if the Tribunal found that there was no jurisdiction, the District Court action would revive.

The Eleventh Circuit, by vacating the stay, caused the present loss of Uiterwyk's contract right to be defended by IEL. This constitutes an unconstitutional taking of Uiterwyk's property interest in the contract. The Eleventh Circuit ignored the domestic effect of Executive Order 12,294, so that its action would make that order unconstitutional as applied herein. In vacating the stay, the Eleventh Circuit acted in derogation of the foreign policy decisions made by the President and usurped the power of the Tribunal to determine its own jurisdiction. *Dames & Moore v. Regan, supra* at 684 and 688. The opinion and order of the Eleventh Circuit is contrary to the requirements of Executive Order 12,294 that all claims in connection with claims presented at the Tribunal be stayed.

Procedurally, the Court created an untenable fiction by "joining" then "severing" the Iranian defendants, and staying that portion of this action to avoid applying Rule 19(b) to determine the prejudice to Uiterwyk.

The Eleventh Circuit had no jurisdiction to render a judgment in this matter, and, having improperly assumed jurisdiction, proceeded to misapply the guidelines for reviewing a stay. The Eleventh Circuit acted in contravention of Petitioner's constitutionally protected contract rights and failed to properly construe and apply Executive Order 12,294.

The foregoing errors are contrary to the precedent established by this Court and conflict with the authority established in other circuits, and demonstrate a need for this Court to exercise its supervisory power to correct the errors of the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Lacked Judicial Power To Review The Stay Order Which Was A Nonappealable Interlocutory Order

An appeal from an otherwise interlocutory order should be permitted only when there is:

> an order, otherwise nonappealable, determining substantial rights of the parties *which will be irreparably lost if review is delayed until final judgment* . . . Citing *U.S. v. Wood*, 295 F.2d 772, 778 (5th Cir.) *cert den.* 369 U.S. 850 (1961); *Huckeby v. Frozen Food Express*, 555 F.2d 542, 549 (5th Cir. 1977).

The grant of a stay will not prejudice the rights of CTI which could also be subject to the jurisdiction of the Tribunal. Any delay which might be caused by the determination by the Tribunal of its jurisdiction could be compensated by money damages. Any delay does not result from an action of Petitioner, but arises because the Executive used private claims in the United States as a bargaining chip to resolve the Iranian hostage crisis.

However, Petitioner will suffer irreparable harm if the stay is vacated and will lose forever its contract right to be defended by its principal and to have its principal stand liable on its own obligations to CTI.

A District Court decision to stay a matter in admiralty has been determined to be a nonappealable interlocutory order. *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454 (1935). Such an order is a calendar

order issued within the Court's inherent power to regulate and to administrate its own business. *Castanho v. Jackson Marine, Inc.*, 650 F.2d 546 (5th Cir. 1981).

A. The United States Court of Appeals for the Eleventh Circuit Erred as a Matter of Law in Finding That a Stay Order Pending Arbitration Is Appealable Pursuant to 28 U.S.C. §1291, a Decision Which Is Contrary to the Precedent of this Court and Which Creates a Conflict Among the Circuits as to the Appealability of Stay Orders

The United States Court of Appeals for the Eleventh Circuit decided that the Stay Order of the District Court was reviewable as a final decision under 28 U.S.C. §1291, which states:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

The Court of Appeals found the sole basis for its appellate jurisdiction under section 1291. Jurisdictional arguments based on 28 U.S.C. §1292(a)(1) and the collateral order doctrine were not reached.[9] (Opinion A-6) The finding of the Eleventh Circuit that the stay order pending arbitration is reviewable as a final order under section 1291 is in direct conflict with decisions of this Court.

In *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454 (1935) petitioners filed libels in Admiralty in the District Court for the Northern District of California claiming damages for personal injuries alleged to have occurred on a vessel. The defendant applied to the Court for a stay pending arbitration. The District Court stayed the trial pending arbitration, while retaining ju-

9. As set forth *infra*, neither of these jurisdictional arguments would prevail.

risdiction to make orders and enter decrees otherwise permitted or required by law. The petitioners appealed and the Circuit Court of Appeals held that the stay orders were interlocutory and nonappealable and dismissed the appeal. The Supreme Court granted certiorari on the petitioner's argument that the decision was in conflict with other circuit court decisions which held that stay orders were final orders, and thus appealable. Petitioner asserted that the stay pending arbitration was a final order. This Court, rejecting that argument, responded:

> we announced decisions in *Enelow v. New York Life Insurance Co.*, 293 U.S. 379, and *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449, which definitely show that the [stay] orders are not final and therefore not appealable under §128, Judicial Code, 28 U.S.C., §225. [Footnote and citations omitted] *Id.* at 456.

Petitioner then argued that, even if not final, the stay in an admiralty case was appealable based on the *Enelow* rationale, arguing that a stay amounts to an injunction. This Court likewise rejected that argument in admiralty actions stating that:

> The cases now before us are in admiralty. The orders appealed from merely stay action in the court pending arbitration and filing of the award. As shown by the *Enelow Case*, they are not interlocutory injunctions within the meaning of §129. *Id.* at 457.

The Court analyzed the intent of Congress concerning the appealability of interlocutory orders in admiralty, stating that Congress, in having specifically provided for the interlocutory appeal of orders in admiralty determining the rights and liabilities of the parties,[10] did not in-

10. 28 U.S.C. §1292(a)(3) permits the appeal of interlocutory decrees ". . . determining the rights and liabilities of the parties to admiralty cases. . ."

tend to make appealable any other interlocutory decrees in admiralty. *Id.* at 458.

The decision of the Iran-United States Claims Tribunal has the effect of a binding arbitration (Declaration Art. IV A-34), and the District Court sitting in admiralty stayed this matter pending the jurisdictional determination of the Tribunal.

The Eleventh Circuit Court of Appeals was clearly incorrect in deciding that the District Court Order staying the proceedings in an admiralty matter was appealable as a final order under section 1291. In *Castanho v. Jackson Marine, Inc.*, 650 F.2d 546 (5th Cir. 1981), that court stated that a district court stay of an admiralty action on its own docket was a calendar order issued under the inherent power of the court to regulate the administration of its own business and that the stay order was not appealable. *Id.* at 548, citing *Anderson v. U.S.*, 520 F.2d 1027, 1028 (5th Cir. 1975) quoting *Penoro v. Reederi A/B DISA*, 376 F.2d 125, 128 (2d Cir.) *cert. den.* 389 U.S. 852 (1967).

In *Jenscnius v. Texaco, Inc., Marine Department*, 639 F.2d 1342 (5th Cir. 1981), the Court of Appeals held that the district court stay order pending proceedings before a state court in the same action was not appealable as a final order under 28 U.S.C. §1291 and was not appealable under section 1292(a)(1) as an interlocutory order granting or denying an injunction. The court reasoned that the stay order did not reach the merits of the claim, and in no way determined, denied or prejudiced any substantive rights of the parties, and therefore could not be said to be an interlocutory decree that determines the rights and liabilities of the parties so as to be appealable under section 1292(a)(3) applicable to admiralty proceedings *supra*, note 10.

The decision of the Court of Appeals for the Eleventh Circuit characterizing the stay order in this matter as an appealable order under 28 U.S.C. §1291 is in di-

rect conflict with the recent case of *Acton Corp. v. Borden, Inc.*, 670 F.2d 377 (1st. Cir. 1982). The First Circuit was confronted with the issue of the appealability of District Court orders which stayed an action while a related case in another district court was permitted to proceed. In its decision, the court analyzed the appealability of orders by district courts staying litigation on their own dockets pending proceedings in other forums and concluded that such orders are not appealable, either under Sections 1291 or 1292(a):

> Ordinarily, a decision by a district court to stay litigation before it pending developments in a different action involving the same issues is not appealable. Such a highly discretionary 'stay' decision, *Landis v. North American Co.*, 299 U.S. 248, 254-255 (1936), is neither 'final' nor equivalent to an 'injunction.' It thus provides no basis for an appeal under either §1291 or §1292(a). Id. at 380.

In *Whyte v. THinc Consulting Group Intern.*, 659 F.2d 817 (7th Cir. 1981) the Seventh Circuit held that an order staying judicial proceedings and directing arbitration that is entered as a part of a continuing proceeding for other relief and does not result in dismissal of the action is not a final order within the meaning of 28 U.S.C. §1291. Here, the District Court did not dismiss the CTI action, but merely stayed the action pending the jurisdictional determination of the Tribunal. As in *Whyte*, the judicial proceedings in this matter are continuing and the stay order is not an appealable final order under section 1291.

In finding that the District Court Order staying an admiralty proceeding on its own docket pending resolution of jurisdictional issues in a separate forum was appealable, the Eleventh Circuit Court of Appeals' opinion is contrary to the authority in the First, Fifth and Seventh Circuits and constitutes an "unauthorized ex-

tension . . . of jurisdiction . . ." *Shanferoke Coal Corp. v. Westchester Corp.*, 293 U.S. 449, 451, (1935). The Eleventh Circuit opinion conflicts with the opinion of this Court and of the Fifth Circuit in regard to the appealability of stays in admiralty proceedings. Additionally, in holding that a stay is a final order under section 1291, the Eleventh Circuit is in direct conflict with the First and Seventh Circuits in regard to the finality of a stay order under section 1291.

This Court should correct the action of the Eleventh Circuit Court of Appeals to bring it into conformity with the precedent of this Court and to resolve the conflict among the circuits concerning the appealability of stay orders as final orders under 28 U.S.C. §1291.

II. In Finding an Abuse of Discretion by the District Court and in Vacating the Order of the District Court Staying This Litigation Pending Determination by the Iran-United States Claims Tribunal of its Jurisdiction over these Claims the Court of Appeals Erred as a Matter of Law in its Application of the Standard of Review.

It is necessary for this Court to exercise its supervisory powers to correct the misapplication by the Court of Appeals of the standard of review to be applied to the exercise of the inherent discretionary authority of the District Court to stay litigation pending the outcome of related proceedings in other forums. The Court of Appeals holding is contrary to the Supreme Court's guidance in *Landis v. North American Co.*, 299 U.S. 248 (1936).

Landis established that the power to stay proceedings is incidental to the inherent power of a court to control the disposition of the cases on its docket, and set the guidelines by which the grant of a stay could be measured to determine whether the stay is appropriate pend-

ing the resolution of related proceedings in other forums. In *Landis*, the Attorney General had moved to stay an action in the District Court for the District of Columbia pending resolution of a test case in the Southern District of New York involving different parties but seeking enforcement of the same federal act. The District Court granted the stay to allow not only the proceedings at the trial court but through all appeals, even to the Supreme Court.

The Supreme Court found that it was appropriate — especially in cases "of extraordinary public moment" — that a party be required to submit to a "not immoderate" delay, pending related proceedings in another forum, *Landis*, *supra*, at 256. The stay as ordered by the District Court in *Landis* was excessive only insofar as the stay continued in effect *after* the decision in the other forum and allowed appeals up to and including the Supreme Court. *Landis*, *supra*, at 256.

The Supreme Court did not set any absolute guideline as to the length of the stay that would be considered "immoderate", but approved the entry of a stay which was "indefinite" to the extent that it would abide the outcome of a related matter in the trial court. The opinion stated that the stay would have been acceptable through the resolution of the test case at the District Court level, but not for all appeals. The stay, although indefinite, was not "immoderate" at least for such time as would have been required for a decision by the trial court.

In the instant action the Court of Appeals mistakenly equated indefinite with immoderate. The Court of Appeals stated that "It is difficult to accurately predict the time that CTI will be forced to stand aside if it is required to await the Tribunal's determination of its jurisdiction to hear these claims, but it can safely be described as an indefinite period of time" (Opinion A-10).

The Eleventh Circuit had already erroneously stated the *Landis* rule, as applied in *McKnight v.*

Blanchard, 667 F.2d 477, 479 (5th Cir. 1982) as allowing a stay order to be vacated ". . . as an abuse of discretion because the stay continued an action for an indefinite period of time." (Opinion A-10).[11] Indefiniteness, or the lack of a precise statement concerning the amount of time to be allowed to permit the Tribunal to determine its jurisdiction does not make the stay "immoderate". This stay is analgous to the stay awaiting the proceedings in a district court, which the Supreme Court in *Landis* noted with approval. A stay pending the outcome of proceedings before the Iran-United States Claims Tribunal, under the *Landis* case, would not be immoderate.

The Court of Appeals substituted its discretion for that of the District Court and erroneously found that "The danger of denying justice by delay for CTI outweighs Uiterwyk's possible inconvenience and costs of piecemeal review." (Opinion A-9). However, the only danger to CTI in this case is a possible delay, compensible by the payment of money damages and, therefore, no irreparable harm can occur to CTI. The danger to Uiterwyk is irreparable prejudice in that, absent IEL in the District Court, Uiterwyk will lose its contract rights allocating risk under its agency contract and Uiterwyk could be held liable for the obligations of its principal.

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11. The *McKnight* case actually involved the loss of civil rights as a result of a stay. A prisoner complained that his treatment *in prison* violated his civil and constitutional rights, and brought an action for damages *and* injunctive relief. The District Court stayed the action until the prisoner would be released from prison, in seven (7) to 14 years. Obviously, the prisoner's claims for injunctive relief from the loss of his civil rights while he was incarcerated would be moot after his release.

III. The Decision of the Court of Appeals for the Eleventh Circuit Which Reverses the District Court's Stay Order Results in an Unconstitutional Taking of Uiterwyk's Property Without Just Compensation.

Uiterwyk as a general agent for IEL, an Iranian shipping company, leased marine cargo containers from CTI for the use of IEL in the transportation of ocean cargoes. As part of its contractual relationship with Uiterwyk, IEL agreed to hold harmless, indemnify and defend Uiterwyk from any action brought as a result of the performance of the agency contract, including the lease of the marine cargo containers. (A-40). As a result Uiterwyk has a present contract right to be defended by IEL in any action brought by CTI for the alleged breach of the agreements for the lease of cargo containers. Absent the stay ordered by the District Court, the contract right of Uiterwyk to be defended by IEL is lost, and Uiterwyk must bear accrued legal expenses for which IEL has contracted to be liable and attempt to defend itself on the contracts.

Valid contracts are compensible property interests subject to the strictures of the Fifth Amendment. *Lynch v. United States*, 292 U.S. 571, 579 (1934). A claim based on a contract vests at the time of the breach of that contract. *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933). Uiterwyk has a present property interest in its contractual right to be defended and indemnified by IEL in this litigation, which vested when IEL breached its contract by failing to appear and defend Uiterwyk against the claims of CTI.

While the action by CTI against Uiterwyk was stayed along with the inextricably connected claims of Uiterwyk against Iran and IEL, Uiterwyk suffered no present irreparable loss of rights under its agency contract, although it was obligated to proceed at the Tribunal to enforce that contract. The claim of Uiterwyk at the

Tribunal is, *inter alia*, that IEL be held solely liable to CTI. However, absent the stay in the District Court, Uiterwyk has forever lost its right under its contract to be defended by IEL in that action.

Article I, Section 10 of the United States Constitution provides that "no state shall . . . pass any . . . law impairing the obligation of contracts." The impairment of contracts clause of the Constitution is specifically addressed to states, but a similar measure of protection against contract impairment by the federal government is given through the due process clause of the Fifth Amendment. *Lynch v. The United States*, 292 U.S. 571, 579 (1934).

Governmental acts which, ". . . derogate from substantial rights" under a contract violate the contracts clause even though the contract has not been destroyed, extinguished or declared invalid. *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934).

In analyzing the government action which impaired the contract, and caused the loss of Uiterwyk's property interest in its contract rights, the Court must evaluate whether a less drastic action could achieve the desired results to avoid the impairment of the contract. *See, United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 28-32 (1977).

The stay of this action pending the decision of the Tribunal as to its jurisdiction over the matter in question allowed the enforcement of Uiterwyk's contract rights without prejudice to the substantive claim of CTI. The decision of the Eleventh Circuit Court of Appeals allowing part of this matter to go forward, in conjunction with Executive Order 12,294 which stayed the remainder, constitutes an unconstitutional violation of the contract clause by irreparably denying Uiterwyk's contract right to a defense by its principal. In the event the Tribunal determined it had no jurisdiction over IEL, Uiterwyk would be free to enforce its contract right to compel IEL to assume Uiterwyk's defense in this action. If the Tri-

bunal finds it has jurisdiction, then this claim can be resolved before the Tribunal.

Presidential power is circumscribed by the Constitution, *New York Times Co. v. The United States*, 403 U.S. 713 (1971). Presidential Executive Orders have the force and effect of statutes, and rules of statutory construction will be applied. *Feliciani v. U.S.*, 297 F.Supp. 1356 (P.R. 1969), *aff'd.*, 422 F.2d 943 (1st Cir.), *cert. den.*, 400 U.S. 823 (1970). Executive Order 12,294 states:

> All claims which *may* be presented to the Iran-United States Claims Tribunal under the terms of Article II of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, and all claims for equitable or other judicial relief *in connection* with such claims, are hereby suspended, except as they may be presented to the Tribunal. (Emphasis added) (A-21).

When language is capable of two interpretations, one constitutional and the other unconstitutional, the constitutional reading should be preferred. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). The Eleventh Circuit interpretation of Executive Order 12,294 would unconstitutionally impair Uiterwyk's contract with IEL by allowing CTI to pursue its claim against Uiterwyk but severing and staying the claims against IEL. The Eleventh Circuit reading of the Executive Order thereby impairs the contract rights of Uiterwyk to be defended by IEL in this action, and erroneously determines the extent of the Tribunal's jurisdiction by excluding CTI's claim from being one which *may* be presented to the Tribunal. Since the constitutional reading is to be preferred, the Eleventh Circuit erred by staying part of this litigation while allowing the remainder to go forward, without the Iranian entities, before the Tribunal has de-

termined its jurisdiction over these claims. In order for Executive Order 12,294 to be constitutional, the correct interpretation as applied to the circumstances of the case under review requires that this *entire* litigation be stayed pending the decision of the tribunal as to its jurisdiction.

In violation of the Fifth Amendment of the Constitution, the decision of the Court of Appeals effected the taking without just compensation of Uiterwyk's contract right to be defended. The Court of Appeals compounded its error by creating a fiction in support of its decision to deny a stay of the action between CTI and Uiterwyk, while staying the third-party action against Iran and IEL. The Court of Appeals held that Iran and IEL are parties necessarily joined to the action pursuant to FRCP 19, and, upon allowing such joinder, severed and stayed those actions, without consideration of the prejudice foreseen in FRCP 19(b) and in disregard of Uiterwyk's rights.

The Court of Appeals for the Eleventh Circuit is obliged to apply Executive Order 12,294 in a constitutional manner. Because the Order is broad enough to suspend all claims which may be presented to the Tribunal, the Order can be constitutionally applied to this action only by staying the entire action, including the claims by CTI against Uiterwyk which are "claims *which may be presented* to the Iran-United States Claims Tribunal." (Emphasis added) (A-21).

IV. The Court of Appeals Misapprehended the Effect of Rules 14(c) and 19 of the Federal Rules of Civil Procedure and Erred in Failing to Apply Rule 19(b)

Impleader in an admiralty matter under Rule 14(c) is permitted where the party to be joined is either: (1) liable to defendant/third-party plaintiff; or (2) liable to plaintiff directly. In this action Uiterwyk, in its Third-Party Complaint, made clear that IEL and Iran were di-

rectly liable to CTI as the principal on the lease contract as well as liable to Uiterwyk on the general agency agreement and by indemnity. Pursuant to Rule 14(c) ". . . the action shall proceed as if the plaintiff [CTI] had commenced it against the third-party defendant [IEL and Iran] as well as the third-party plaintiff [Uiterwyk]." *Northern Contracting Co. v. C. Langenfelder & Sons, Inc.*, 439 F.Supp. 621, (E.D.Pa. 1977)

The Court of Appeals held that Iran and IEL *were* parties to be joined under Rule 19(a), and then effectively prevented the joinder of these parties by the fiction of joining and then severing and staying the third-party claims against Iran and IEL. The Court improperly avoided the required evaluation of indispensability under Rule 19(b).

IEL, the disclosed principal of Uiterwyk, is liable to CTI for any provable breaches of the alleged container lease contracts. IEL is a nationalized or otherwise controlled entity of the government of Iran and, therefore, claims against IEL are subject to the jurisdiction of the Iran-United States Claims Tribunal.

Additionally, the containers that are the subject of this litigation remain in Iran, under the possession, custody and control of IEL and the Government of Iran. The retention of these containers by Iran and IEL, in addition to the apparent breach of contract, constitutes the unlawful taking and conversion of the property upon which CTI bases its claim. These same breaches of obligation, both contractual and tortious, are the basis for the cause of action proceeded on in the District Court and are the basis for the claim before the Tribunal. The claims should be asserted against Iran and IEL, the parties in breach and wrongfully in possession of the containers. The claims against IEL and Iran are inextricably related to this litigation and cannot be severed. *State Mutual Life Insurance Co. of America v. Arthur Anderson Company of America*, 63 F.R.D. 389, 394 (S.D.N.Y. 1974), 65 F.R.D. 519, 522 (S.D.N.Y. 1975).

Rule 19 requires that the court determine whether, in equity and good conscience, the action should proceed among the parties or should be dismissed absent the presence of necessary parties. Rule 19(b) in its relevant part states:

> The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him *or those already parties*; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. (Emphasis added).

The Circuit Court erred in failing to apply Rule 19(b) to determine whether IEL and Iran were indispensable parties, or that the District Court acted properly in staying this action to prevent injustice. Absent Iran and IEL, prejudice to Uiterwyk must occur. The Eleventh Circuit erred in attempting to avoid the requisite determination of indispensability by the fiction of "granting" joinder, and immediately severing the action under Rule 42(b), and then staying the action under Executive Order 12,294.

Executive Order 12,294 suspends all claims which *may* be presented to the Tribunal. The claims of CTI fall within the broad definition of arbitral claims. (Art. IV, A-36). Since the CTI claims are arguably within the jurisdiction of the Tribunal, they should be stayed.

If it were not for the unique circumstances created by the resolution of the Iranian hostage crisis, this action could have gone forward in the United States District Court with all necessary parties present, including IEL. The action of the United States in settling the hostage

crisis, including the vacating of Uiterwyk's attachment of Iranian assets in New York, clearly controls the course of this litigation.

The underlying factual basis for this claim is the failure of IEL to return or pay for the containers in question. This claim may be, and has been, asserted at the Tribunal. It is inequitable to compel Uiterwyk to proceed separately before the District Court and the Tribunal on the same issues, where Uiterwyk sustains severe prejudice in the District Court through the loss of its contractual and procedural rights to be defended by IEL, at least until the Tribunal determines its jurisdiction over IEL.

V. The Decision of the Court of Appeals for the Eleventh Circuit Vacating the District Court's Orders Staying This Litigation Pending Determination by the Iran-United States Claims Tribunal of Its Jurisdiction Over These Claims is Contrary to Executive Order 12,294, is a Usurption of the Tribunal's Jurisdiction and Power and Is Contrary to the Decision of this Court in Dames & Moore v. Regan, 453 U.S. 654 (1981).

Executive Order No. 12,294 suspends all claims "which may be presented" to the Tribunal, and "all claims for equitable or judicial relief in connection with such claims." (A-21)

The Executive Order, Section 3, provides that the Claims Tribunal shall itself resolve all disputes as to jurisdiction:

> Suspension under this Order of a claim or a portion thereof submitted to the Iran-United States Claims Tribunal for adjudication shall terminate upon a determination *by the Tribunal* that it does not have jurisdiction over such claim or such portion thereof. (Emphasis Added) (A-22).

The Settlement Agreement states that "It is the purpose of [the United States and Iran] . . . to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration." (A-24 - 25). Under the agreement, the United States is obligated

> to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation *based on such claims*, and to bring about the termination of such claims through *binding arbitration*. (Emphasis added) (A-25).

The President's extraordinary exercise of power in suspending claims was upheld by this Court where "the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another . . . ." *Dames & Moore v. Regan*, 453 U.S. 654, 688, (1981). This Court found it significant that the President provided an alternate forum, capable of providing meaningful relief, in order to resolve claims and disputes. *Id.* at 686.

Executive Order No. 12,294 does not divest the Federal Courts of jurisdiction but only suspends claims. The Court states:

> As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will 'revive' and become judicially enforceable in United States courts." *Dames & Moore*, *supra*, at 684, 685.

The Tribunal has the power to determine its own jurisdiction. Those claims which the Tribunal rejects as not being properly before it revive in the Courts of the United States. The stay order of the District Court in this

action was in accord with Executive Order 12,294 and the power of the Tribunal under the Hostage Accord to determine its jurisdiction, and with the holding of this Court in *Dames & Moore*, that claims be suspended, to be revived if the Tribunal determines they are not within its jurisdiction.

The Court of Appeals' reversal of the District Court Order is contrary to Executive Order 12,294, and further usurps the power of the Tribunal to decide its own jurisdiction, which was specifically granted to the Iran-United States Claims Tribunal by Executive Agreement and recognized in Section 3 of the Executive Order which provides for the domestic enforcement of the Executive Agreement.

By vacating the Order of the District Court staying the Civil Action until the determination by the Iran-United States Claims Tribunal of its jurisdiction to hear the underlying claims, the Court of Appeals encroached on the power of the Claims Tribunal to determine its own jurisdiction. The Eleventh Circuit approach conflicts with that of the Fifth Circuit Court of Appeals. The Supreme Court should take this opportunity to establish a clear mandate as it relates to the power of the Tribunal to establish its jurisdiction over claims which may be brought before it.

In *Gulf Ports Crating Co. v. Ministry of Roads, etc.*, 674 F.2d 318 (5th Cir. 1982) the Fifth Circuit Court of Appeals had the opportunity to consider the issue of what claims are suspended by the Executive Order. In *Gulf Ports Crating Co.*, the plaintiff sought to recover storage charges and security costs incurred as a bailee in storing goods purchased by the defendant, the Iranian Ministry of Roads and Transportation. Gulf Ports sought and was granted a writ of prejudgment attachment. The United States filed a Statement of Interest which asserted that the 1981 Declarations between the United States and Iran and the Executive Orders required the District Court to vacate the writ of attachment and to

stay the action on the Gulf Ports claim since it was under the jurisdiction of the Iran-United States Claims Tribunal. The District Court followed this recommended course of action and plaintiff Gulf Ports appealed the District Court's decision. Gulf Ports argued that its claim was improperly suspended because it did not fall within the class of claims assigned to the Arbitral Tribunal. The Court of Appeals rejected Gulf Ports arguments concluding that the claim fell within the broad definition of arbitral claims. The Court of Appeals for the Fifth Circuit further emphasized that the issue as to which claims were within the jurisdiction of the Claims Tribunal was not one properly before it. The Court states:

> We also note that any disputes as to the tribunal's jurisdiction are to be resolved by the tribunal itself and that Executive Order 12,294 provides for suspension of all claims that *may* be presented to the tribunal. *Id.* at 320. (Emphasis in original)

The question of the Tribunal's power to determine its own jurisdiction was discussed in *Jafari v. Islamic Republic of Iran*, 539 F.Supp. 209 (N.D.Ill. 1982). In that case the plaintiff, a former Iranian national, sought to recover money owed him for a claim of wrongful expropriation of property in Iran. Plaintiff became a United States' citizen on March 17, 1981, after the seizure of the property but before the filing of his suit. The District Court decided that it did not have jurisdiction to consider his claim.

> Kianoosh was not a United States citizen when the acts that triggered his claims occurred, or indeed when the Accords were signed or the Order promulgated. He was however such a citizen both when he filed his claim with the Tribunal and when he later filed this action. Thus the application of the Accords to Kianoosh's claims may be open to question. But consistent with the general concept of 'ju-

> risdiction to decide jurisdiction,' Section 3 of the Order leaves it to the *Tribunal* to decide whether a particular claim is within its jurisdiction. Once Kianoosh has invoked its power, he must await its decision of that question before he can pursue his claims elsewhere. *Id.* at 212. (Emphasis in original, footnotes omitted)

The District Court concluded that, at least until the Tribunal were to reject jurisdiction over the plaintiff's claim, the claim before the District Court would be *dismissed* without prejudice.

The District Court in Tampa stayed this matter on June 19, 1981 pending the Tribunal's determination of its own jurisdiction over claims before it. The stay order was entered seven months prior to the filing deadline with the Tribunal. Uiterwyk filed its claim with the Tribunal, which includes, *inter alia*, the claim of CTI for the lost containers and unpaid rentals. The District Court did not dismiss the CTI action, as did the *Jafari* Court in Illinois, but merely stayed the action pending the jurisdictional determination of the Tribunal.

CONCLUSION

The District Court acted within the sound exercise of its discretion, and was in compliance with Executive Order 12,294 and the interests of justice, in staying this action. The Court of Appeals acted without judicial power in reviewing this nonappealable interlocutory order, and misapprehended and misapplied the recognized guidelines for judging a stay by equating "indefinite" with "immoderate".

The vacating of the District Court stay and the severance and stay of the claims against IEL and Iran effect an unconstitutional taking of Petitioner's contract rights, and an impairment of Petitioner's contract.

Contrary to Executive Order 12,294, and the opin-

ion of this Court in *Dames & Moore v. Regan*, the Eleventh Circuit usurped the prerogative of the Tribunal in determining the Tribunal's jurisdiction.

The opinion of the Eleventh Circuit is in conflict with the precedent of this Court, and conflicts with the holdings of the Circuit Courts for the First, Fifth and Seventh Circuits.

This case presents an important and recurring issue concerning the appealability of interlocutory stay orders and places in issue the ability of the Iran — United States Claims Tribunal to function, a significant issue concerning the foreign affairs power of the United States.

Accordingly, a Writ of Certiorari should be issued to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit of September 13, 1982 in the within matter.

Respectfully submitted,

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